

No. 12058

United States
Court of Appeals
for the Ninth Circuit

NATIONAL UNION OF MARINE COOKS AND
STEWARDS, an unincorporated association,
Appellant,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,
Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California,
Southern Division

No. 27862-G

LUCKENBACH STEAMSHIP COMPANY,
Plaintiff,

vs.

NATIONAL UNION OF MARINE COOKS AND
STEWARDS, an unincorporated association,
Defendant.

AMENDED COMPLAINT FOR DAMAGES
FOR BREACH OF CONTRACT UNDER
THE LABOR MANAGEMENT RELATIONS
ACT OF 1947.

The action arises under the Labor Management Relations Act of 1947, Chapter 120, Public Law 101, Title III, Section 301, hereinafter referred to as "the Act".

Plaintiff Luckenbach Steamship Company, a corporation, files this amended complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, and for a first cause of action against National Union of Marine Cooks and Stewards, an unincorporated association, alleges:

I.

Luckenbach Steamship Company, plaintiff herein, was at all times mentioned in this complaint, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

II.

Plaintiff is and at all times herein mentioned has been the charterer and operator of the vessel SS Leonidas Polk. [1*]

III.

National Union of Marine Cooks and Stewards, defendant herein, is and at all times mentioned herein has been an unincorporated association composed of employees performing work in the Stewards' Department of vessels, including those operated by plaintiff, sailing out of Pacific Coast ports of the United States to other American ports and ports of foreign countries upon the high seas and upon navigable waters of the United States. Defendant is and at all times herein mentioned has been a labor union or labor organization with its principal office and place of business in the City and County of San Francisco in the Northern District of California, and is and at all times herein mentioned has been engaged in its business and activities as a labor union or organization in the City and County of San Francisco in the Northern District of California. Defendant is hereinafter sometimes referred to as the "Union".

IV.

Defendant at all times herein mentioned represented employees of plaintiff in the Stewards' Department of the said SS Leonidas Polk as a labor

* Page numbering appearing at foot of page of original certified Transcript of Record.

organization and collective bargaining agent in accordance with the provisions of the agreement hereinafter set forth.

V.

On or about November 26, 1946, plaintiff and defendant made and entered into a certain contract providing for and fixing, among other things, the wages, hours, working conditions and other conditions of employment of the personnel employed by plaintiff in the Stewards' Department of vessels operated by plaintiff, including the vessel SS Leonidas Polk. [2]

VI.

Said contract is one of Maritime service, and was entered into between plaintiff, as employer, and defendant, which is a labor organization representing employees in the shipping industry, an industry affecting commerce as defined in the Act. A true and correct copy of said contract is attached hereto as Exhibit A and made a part hereof by reference. Said contract and the provisions thereof were in full force and effect at all times mentioned herein.

VII.

In and by said contract the plaintiff agrees "to give preference in employment to members of the Union and to secure employees in their Stewards' Department through the offices of the Union", and the defendant agrees "to furnish capable, competent and satisfactory employees" to plaintiff. Said contract further provides that there "shall be no strikes, lockouts or stoppages of work while the provisions of this agreement are in effect".

VIII.

On February 25, 1947, said SS Leonidas Polk was lying in the navigable waters of the United States in the Port of Seattle, Washington, and was being prepared and made ready for a voyage shortly to commence from said Port of Seattle, Washington, to the Port of San Francisco, California. At said time and place plaintiff submitted to defendant an order for a complete complement of Stewards' Department employees for the above named vessel and voyage, to be on board not later than 9:00 a.m., February 26, 1947. Defendant failed and refused to furnish said employees, and at all times thereafter and until at or about 1:30 p.m., March 11, 1947, continued to fail and refuse to furnish said [3] employees. Defendant during said period from February 26, 1947, to 1:30 p.m. of March 11, 1947, engaged in a strike and stoppage of work against plaintiff, and thereby violated the said contract between the parties as more particularly hereinafter alleged.

IX.

At all times herein mentioned defendant maintained at Seattle, Washington, an office or hiring hall for the purpose of furnishing and dispatching Stewards' Department crew members to vessels in the Puget Sound area, including vessels at the Port of Seattle, Washington. From time to time during the period from February 26, 1947, to March 11, 1947, inclusive, plaintiff requested defendant, in accordance with said contract, by orders placed with said office or hiring hall and otherwise, to furnish Stewards' Department employees

to man and sail said vessel, but defendant, in violation of said contract, failed and refused to furnish plaintiff with said employees as aforesaid.

X.

Said vessel completed loading at Seattle, Washington, at or about 11:00 p.m. of March 5, 1947, and was then and there ready and scheduled to depart. Because of the failure and refusal of defendant to man and sail said vessel, and because of defendant's strike and stoppage of work, said vessel was prevented by defendant from departing from said port until 4:10 p.m., March 11, 1947. As a direct and proximate result of said failure and refusal of defendant to man said vessel, and the strike and stoppage of work by defendant resulting in the delay and detention of said vessel as aforesaid, plaintiff has been damaged in the amount of \$5,466.00 [4]

XI.

Plaintiff has at all times performed all conditions precedent provided or required by the contract herein referred to and has performed each and all of its obligations under said contract.

Luckenbach Steamship Company, a corporation, for a second cause of action against National Union of Marine Cooks and Stewards, an unincorporated association, arising under the Labor Management Relations Act of 1947, Chapter 120, Public Law 101, Title III, Section 301, hereinafter referred to as "the Act", alleges:

I.

Plaintiff refers to and incorporates herein, with the same force and effect as if herein set forth in

full, all the allegations contained in paragraphs I, III, VI, VII, and XI of its first cause of action.

II.

Plaintiff is and at all times herein mentioned has been the charterer and operator of the vessel SS Percy Foxworth.

III.

Defendant at all times herein mentioned represented employees in the Stewards' Department of the SS Percy Foxworth as a labor organization and collective bargaining agent in accordance with the provisions of the agreement herein set forth.

IV.

On or about November 26, 1946, plaintiff and defendant made and entered into a certain contract providing for and fixing, among other things, the wages, hours, working conditions and other conditions of employment of the [5] personnel employed by plaintiff in the Stewards' Department of vessels operated by plaintiff, including the vessel SS Percy Foxworth.

V.

On February 13, 1947, on or about 10:00 a.m., the SS Percy Foxworth was lying in the navigable waters of the United States in the Port of Seattle, Washington, and was being prepared and made ready for a voyage shortly to commence from said port to the Port of Yokohama, Japan. At said time and place plaintiff submitted to the employees in the Stewards' Department of said vessel for signature, and requested that they sign, shipping articles in the customary form for said voyage, but defendants instructed the said employees to

refuse to sign said shipping articles until and unless plaintiff should agree to change the articles in certain respects. Pursuant to said instructions given them by defendant, as aforesaid, and in violation of the said contract, the employees refused to sign said shipping articles and to sail said vessel. Defendant, from February 13, 1947, on or about 10:00 a.m., to February 19, 1947, violated its contract by engaging in a strike and stoppage of work against plaintiff during said period and by failing and refusing to furnish Stewards' Department employees to plaintiff as requested by the said contract.

VI.

On the forenoon of February 15, 1947, the SS Percy Foxworth was lying in the navigable waters of the United States in the Port of Seattle, Washington, and was being prepared and made ready for a voyage shortly to commence from said Port of Seattle, Washington, to the Port of Yokohama, Japan. At said time and place plaintiff submitted to defendant an order for a complement of Stewards' Department employees for the above named vessel and voyage, to replace [6] certain Stewards' Department employees then on board who refused to sign articles for said voyage, on instructions from defendant, and refused to man and sail said vessel, said replacements to be on board not later than midnight of February 15, 1947. Defendant failed and refused to furnish said employees, and at all times thereafter and until at or about 10:00 a.m., February 19, 1947, continued to fail and refuse to furnish said employees. Defendant during said period from February 15, 1947, to 10:00 a.m.

of February 19, 1947, engaged in a strike and stoppage of work against plaintiff and thereby violated the said contract between the parties as more particularly hereinafter alleged.

VII.

At all times herein mentioned defendant maintained at Seattle, Washington, an office or hiring hall for the purpose of furnishing and dispatching Stewards' Department crew members to vessels in the Puget Sound area, including vessels at Seattle, Washington. From time to time during the period from February 15, 1947, to February 19, 1947, inclusive, plaintiff requested defendant in accordance with said contract, by orders placed with said office or hiring hall and otherwise, to furnish Stewards' Department employees to man and sail said vessel, but defendant, in violation of said contract, failed and refused to furnish plaintiff with said employees as aforesaid.

VIII.

Said vessel completed loading at Seattle, Washington, at or about 10:00 p.m. of February 17, 1947, and was ready and scheduled to depart at 11:00 p.m. of said date. Because of the failure and refusal of defendant to man and sail said vessel, and because of defendant's strike and [7] stoppage of work, said vessel was prevented by defendant from departing from said port until 11:30 a.m., February 19, 1947. As a direct and proximate result of said failure and refusal of work by defendant, resulting in the delay and detention of said vessel as aforesaid, plaintiff has been damaged in the amount of \$1,456.00.

Luckenbach Steamship Company, a corporation, for a third cause of action against National Union of Marine Cooks and Stewards, an unincorporated association, arising under the Labor Management Relations Act of 1947, Chapter 120, Public Law 101, Title III, Section 301, hereinafter referred to as "the Act", alleges:

I.

Plaintiff refers to and incorporates herein with the same force and effect as if herein set forth in full all the allegations contained in paragraphs I, III, VI, VII, and XI of its first cause of action.

II.

Plaintiff is and at all times herein mentioned has been the charterer and operator of the vessel SS Douglas Victory.

III.

Defendant at all times herein mentioned represented employees in the Stewards' Department of the SS Douglas Victory as a labor organization and collective bargaining agent in accordance with the provisions of the agreement herein set forth.

IV.

On or about November 26, 1946, plaintiff and defendant made and entered into a certain contract providing for [8] and fixing, among other things, the wages, hours, working conditions and other conditions of employment of the personnel employed by plaintiff in the Stewards' Department of vessels operated by plaintiff, including the vessel SS Douglas Victory.

V.

On January 9, 1948, at or about 3:00 p.m., the

SS Douglas Victory was lying in the navigable water of the United States in the Port of Stockton, California, and was being prepared and made ready for a voyage shortly to commence from said port to the Port of San Pedro, California. At said time and place plaintiff submitted to the employees in the Stewards' Department of said vessel for signature, and requested that they sign, shipping articles in the customary form for said voyage, but defendant instructed the said employees to refuse to sign said shipping articles. Pursuant to said instructions given them by defendant, as aforesaid, and in violation of the said contract, the employees refused to sign said shipping articles and to man and sail said vessel. Defendant, from January 9, 1948. at or about 3:00 p.m., to January 13, 1948, at or about 1:00 p.m., violated its contract by engaging in a strike and stoppage of work against plaintiff during said period, and by failing and refusing to furnish Stewards' Department employees to plaintiff as requested by the said contract. During said period plaintiff requested said employees to sign said shipping articles on numerous occasions, but the said employees each and every time refused to sign same, until at or about 1:00 p.m., January 13, 1948, all pursuant to the instructions of defendant and by its direction. [9]

VI.

Said vessel completed loading at Stockton, California, on or before January 12, 1948, and was ready and scheduled to depart for the Port of San Pedro, California, in accordance with her sailing orders, at 8:45 a.m., January 12, 1948, at which

time, and solely because of the violation of said contract by defendant, as herein set forth, said vessel departed from Stockton, California, and put in the Port of San Francisco, California. Because of the failure and refusal of defendant to man and sail said vessel, and because of defendant's strike and stoppage of work, said vessel was prevented by defendant from departing from the latter port for the Port of San Pedro, California, until 3:00 p.m., January 13, 1948. As a direct and proximate result of the delay and detention of said vessel which resulted solely from the violation by defendant of its contract with plaintiff, as herein set forth, plaintiff has been damaged in the amount of \$2,092.00.

Wherefore, plaintiff demands judgment in the sum of \$9,014.00, with interest at the legal rate on \$5,466.00 from February 25, 1947, to date of payment; on \$1,456.00 from February 13, 1947, to date of payment; and on \$2,092.00 from January 9, 1947, to date of payment, together with costs of this action.

/s/ BROBECK, PHLEGER &
HARRISON,

/s/ MARION B. PLANT,
Attorneys for Plaintiff. [10]

(Acknowledgment of receipt of service.)

(Here follows Exhibit "A"—agreement between National Union of Marine Cooks and Stewards and Pacific American Shipowners Association dated: November 26, 1946.)

[Endorsed]: Filed Jan. 28, 1948. [11]

[Title of District Court and Cause.]

MOTION FOR STAY OF PROCEEDINGS

Comes now the defendant above named and, for the reasons and upon the grounds hereinafter set forth, moves the above entitled Court for its order staying proceedings herein pursuant to Section 3 of the Federal Arbitration Act (9 U.S.C.A. § 3).

Said motion is made upon the grounds that it appears from the face of the complaint on file herein, and the exhibit attached thereto, that one or more issues are presented which are referable to arbitration under a written collective bargaining agreement.

Said motion is based upon the said complaint, the said written collective bargaining agreement, a copy of which is attached to said complaint as an exhibit, and upon a Memorandum of Points and Authorities herewith submitted. [12]

Said motion is further based upon the fact, which said defendant hereby asserts to be true, that the said defendant (applicant in this motion) is not in default in proceeding with such arbitration under the said collective bargaining agreement.

Dated: This 2nd day of April, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
By RICHARD GLADSTEIN,
Attorneys for Defendant.

Memorandum of Points and Authorities

9 U.S.C.A. § 3.

Agostine Bros. Building Corp. vs. U. S., 142
Fed. (2d) 854 (4th Circuit)

Gerald Donahue vs. Susquehanna Collieries Co., 138 Fed. (2d) 3 (3rd Circuit)

Shanferoque Coal & Supply Co. vs. Westchester Service Co., 70 Fed. (2nd) 297 (2nd Circuit)

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Apr. 2, 1948. [13]

In the United States District Court, for the Northern District of California, Southern Division

No. 27862-G

LUCKENBACH STEAMSHIP COMPANY,
Plaintiff,

vs.

NATIONAL UNION OF MARINE COOKS
AND STEWARDS, and unincorporated association,
Defendant.

ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

The Federal Arbitration Act of February 12, 1923 (9 USC §1 et seq.) is not applicable to actions maintained, as is this cause, pursuant to §301 of the National Labor Management Relations Act of 1947, Pub. Law 101 80th Cong. C. 120. Colonial Hardwood Flooring Co. v. International Union United Furniture Workers of America, et al. 76 Fed. Supp. 493.

The motion to stay proceedings is denied.

Dated: May 12, 1948.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed May 12, 1948. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the National Union of Marine Cooks and Stewards, an unincorporated association, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled court denying motion to stay proceedings pending arbitration, entered in this action on the 12th day of May, 1948.

Dated this 25th day of May, 1948.

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

By /s/ RICHARD GLADSTEIN,

By /s/ NORMAN LEONARD,

Attorneys for Defendant.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed June 9, 1948. [15]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now National Union of Marine Cooks and Stewards, an unincorporated association, defendant and appellant herein, and designates the following as the record on appeal in the above-entitled matter:

1. Amended Complaint for Damages, for breach of contract under the Labor-Management Relations Act of 1947, filed herein on January 28, 1948.

2. Motion for Stay of Proceedings filed herein on April 2, 1948.

3. Order Denying Motion to Stay Proceedings Pending Arbitration, filed herein May 12, 1948.

4. Notice of Appeal, filed herein June 9, 1948.

5. This Designation of Record on Appeal, dated June 11, 1948.

Dated: June 11, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ RICHARD GLADSTEIN,

By /s/ NORMAN LEONARD,
Attorneys for Defendant.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed June 12, 1948. [16]

[Title of District Court and Cause.]

DESIGNATION BY PLAINTIFF AND RE-
SPONDENT OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL.

Plaintiff and respondent, Luckenbach Steamship Company, hereby designates the following portions of the record in the above action in addition to those designated by defendant and appellant in its Designation of Record on Appeal on file herein.

1. All of Exhibit A attached to the Amended Complaint on file herein.

2. This Designation by Plaintiff and Respondent of Additional Portions of Record on Appeal.

Dated: June 18, 1948.

BROBECK, PHLEGER &
HARRISON,

By ROBERT E. BURNS,
Attorneys for Plaintiff and
Respondent.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed June 18, 1948. [17]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellant herein may have to and including August 28, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 19, 1948.

DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed July 19, 1948. [18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellants herein, may have to and including September 7, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: August 26, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Aug. 26, 1948. [19]

District Court of the United States, Northern
District of California

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Luckenbach Steamship Company, Plaintiff, vs. National Union of Marine Cooks and Stewards, an unincorporated association, Defendant, No. 27862-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of \$6.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 4th day of September, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12058. United States Court of Appeals for the Ninth Circuit. National Union of Marine Cooks and Stewards, an unincorporated association, Appellant, vs. Luckenbach Steamship Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 7, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

